(7)

Supreme Court, U.S.
FILED
MAR 6 - 2006
OFFICE OF THE CLERK

No. 05-5966

In The Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals Division One

RESPONDENT'S BRIEF ON THE MERITS

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

RANDALL M. HOWE
Chief Counsel
Criminal Appeals Section
(*Counsel of Record*)

MICHAEL O'TOOLE
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourteenth Amendment's Due Process Clause require a State to enact the complete *M'Naghten* Rule as the test for insanity, when no fundamental principle of justice requires a State to enact an insanity defense or any particular definition of insanity?

2. Does the Fourteenth Amendment's Due Process Clause prohibit a State from defining mens rea without regard to mental disease or defect, when no fundamental principle of justice requires a State to account for mental disease or defect in any particular way?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	11
ARGUMENT	15
I. The Fourteenth Amendment's Due Process Clause Does Not Require a State to Enact the Complete *M'Naghten* Rule as the Test for Insanity Because No Fundamental Principle of Justice Requires a State to Enact an Insanity Defense or Any Particular Definition of Insanity	15
A. "Constitutionalizing" a Particular Insanity Defense Violates the States' Historical Authority to Define Elements of Criminal Offenses and Affirmative Defenses	16
B. Arizona's Definition of Insanity Necessarily Encompasses the Question Whether a Defendant Understood the Nature and Quality of His Act	24
II. The Fourteenth Amendment's Due Process Clause Does Not Prohibit a State from Defining Mens Rea Without Regard to Mental Disease or Defect Because No Fundamental Principle of Justice Requires a State to Account for Mental Disease or Defect in Any Particular Way	26

TABLE OF CONTENTS – Continued

Page

A. The Arizona Court of Appeals Resolved Clark's Claim on Independent State-Law Grounds 27

B. No Principle of Justice Requires a State to Admit Evidence of Mental Disease or Defect to Negate Mens Rea Because States Are Free to Define Elements of Criminal Offenses Without Regard to Mental Disease or Defect 30

1. Due process does not require the admission of mental disease or defect evidence when a State has defined criminal offenses in such a way that mental disease or defect evidence is irrelevant 30

2. Arizona has chosen to define its mens rea elements without regard to mental disease or defect, making such evidence irrelevant to mens rea 35

CONCLUSION 44

TABLE OF AUTHORITIES

Page

CASES

Abbott v. Cunningham, 766 F. Supp. 1218 (D.N.H. 1991) 21

Bethea v. United States, 365 A.2d 64 (D.C. App. 1976) 41, 42, 43

Blessing v. Freestone, 520 U.S. 329 (1997) 26

Coleman v. California, 317 U.S. 596 (1942) ... 13, 31, 32, 33

Coleman v. Thompson, 501 U.S. 722 (1991) 29

Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) 21

Fisher v. United States, 328 U.S. 463 (1946) 13, 31, 32, 33, 34

Foucha v. Louisiana, 504 U.S. 71 (1992) 17, 43

Greenwood v. United States, 350 U.S. 366 (1956) 20, 40

Hicks v. Miranda, 422 U.S. 332 (1975) 32

Jessner v. State, 231 N.W. 634 (Wis. 1930) 25

Jones v. United States, 463 U.S. 354 (1983) 19, 20

Leland v. Oregon, 342 U.S. 790 (1952) .....*passim*

Maas v. Territory, 63 P. 960 (Okla. 1901) 24

Marshall v. United States, 414 U.S. 417 (1974) 40

Medina v. California, 505 U.S. 437 (1992) 11, 16, 17, 30

Mill v. State, 585 P.2d 546 (Alaska 1979) 42

Montana v. Egelhoff, 518 U.S. 37 (1996) .....*passim*

Montgomery v. State, 151 S.W. 813 (Tex. Cr. App. 1912) 24

Muench v. Israel, 715 F.2d 1124 (7th Cir. 1982)..... 32, 33, 34

TABLE OF AUTHORITIES – Continued

Page

Mullaney v. Wilbur, 421 U.S. 684 (1975) 27, 28

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874) 27

Patterson v. New York, 432 U.S. 197 (1977) 10, 16, 30, 31

People v. Coleman, 126 P.2d 349 (Cal. 1942) 31, 32

People v. Troche, 273 P. 767 (Cal. 1929) 31, 32

Powell v. Texas, 392 U.S. 514 (1968) ..... *passim*

Regina v. M'Naghten, 4 St. Tr. 847 (1843) 21, 22

Rex v. Arnold, 16 How. St. Tr. 695 (10 George I A.D. 1724) 20, 35

Rex v. Hadfield, (K.B. 1800) 27 St. Tr. 1281 (1820) 20, 35

Robinson v. California, 370 U.S. 660 (1962) 18

Speiser v. Randall, 357 U.S. 513 (1958) 16

Stamper v. Commonwealth, 324 S.E.2d 682 (Va. 1985) 41, 43

State v. Bethel, 66 P.3d 840 (Kan. 2003) 21

State v. Chavez, 693 P.2d 893 (Ariz. 1984) 25

State v. Corley, 495 P.2d 470 (Ariz. 1972) 24

State v. Fendler, 622 P.2d 23 (Ariz. App. 1980) 29

State v. Gulbrandson, 906 P.2d 579 (Ariz. 1995) 29

State v. Herrera, 895 P.2d 359 (Utah 1995) 21

State v. Korell, 690 P.2d 992 (Mont. 1984) 21

State v. Lefevre, 972 P.2d 1021 (Ariz. App. 1998) 39

State v. Mott, 931 P.2d 1046 (Ariz. 1997) ..... *passim*

State v. Provost, 490 N.W.2d 93 (Minn. 1992) 41, 42

TABLE OF AUTHORITIES – Continued

Page

State v. Schauten, 707 N.W.2d 820 (S.D. 2005) 42

State v. Searcy, 798 P.2d 914 (Idaho 1990) 21

State v. Tamplin, 986 P.2d 914 (Ariz. App. 1999) 24

State v. Walton, 769 P.2d 1017 (Ariz. 1989) 29

State v. Wilcox, 436 N.E.2d 523 (Ohio 1982) 41, 42

Steele v. State, 294 N.W.2d 2 (Wis. 1980) 41, 42

Troche v. California, 280 U.S. 254 (1929) 13, 31, 32, 33

United States v. Galvan, 407 F.3d 954 (8th Cir. 2005) 39

United States v. United Foods, Inc., 533 U.S. 405 (2001) 27

United States v. Wurliger, 981 F.2d 1497 (6th Cir. 1992) 39

Wahrlich v. Arizona, 479 F.2d 1137 (9th Cir. 1973) 41

Wainwright v. Sykes, 433 U.S. 72 (1977) 29

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 1

U.S. Const. amend. XIV 1, 15, 26

STATUTES

1993 Ariz. Sess. Laws, ch. 256, § 2 15

1993 Ariz. Sess. Laws, ch. 256, § 3 15

28 U.S.C. § 1257(a) 1

Ariz. Rev. Stat. § 13-502(A) 1, 11, 15, 24

TABLE OF AUTHORITIES – Continued

Page

Ariz. Rev. Stat. § 13-503 39

Ariz. Rev. Stat. § 13-702(C)(2) 43

Ariz. Rev. Stat. § 13-1105(A)(3) 2

OTHER AUTHORITIES

American Law Institute, Model Penal Code, § 4.01 (Philadelphia: A.L.I. 1962) 21, 23

Aranella, Peter, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Col. L. Rev. 827 (Oct. 1977) 35

Goldstein, Abraham S., *The Insanity Defense* (Yale University Press 1967) 25

Koeller, Frederica B., *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 12 U. Pa. L. Rev. 733 (1964) 34

LaFave, Wayne R. & Scott, Jr., Austin W., *Criminal Law* (West 1972) 22

Morse, Stephen J., *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1 (1984) 42

Robinson, Daniel N., *Wild Beasts & Idle Humours* (Harvard University Press 1996) 35

Simon, Rita J. & Aaronson, David E., *The Insanity Defense* (Praeger 1988) 21, 25

TABLE OF AUTHORITIES – Continued

Page

Weihofen, Henry, *Mental Disorder as a Criminal Defense* (Dennis & Co. 1954) 22

Zilboorg, Gregory, *Misconceptions of Legal Insanity*, 9 Am. J. Orthopsychiatry 540 (1939) 25

OPINION BELOW

The Arizona Court of Appeals' decision is unpublished. *State v. Clark*, Nos. 1 CA-CR 03-0851 and 1 CA-CR 03-0985 (Ariz. App. Jan. 25, 2005). (J.A. 336-54.) The Arizona Supreme Court's order denying discretionary review without comment is also unpublished. (J.A. 355.)

STATEMENT OF JURISDICTION

The Arizona Court of Appeals entered its judgment on January 25, 2005. (J.A. 336.) The Arizona Supreme Court denied discretionary review on May 25, 2005. (J.A. 355.) Petitioner filed his Petition for Writ of Certiorari in this Court on August 17, 2005, and this Court granted the petition on December 5, 2005. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Arizona Revised Statutes § 13-502(A) provides in relevant part as follows:

> A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did

> not know that the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. . . .

Arizona Revised Statutes § 13-1105(A)(3) provides that a person commits first degree murder if:

> Intending or knowing that the person's conduct will cause the death of a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

STATEMENT OF THE CASE

On July 27, 2000, Clark was indicted on one count of first-degree murder under Arizona Revised Statutes § 13-1105(A)(3) for intentionally or knowingly killing a law enforcement officer acting in the line of duty. (R.O.A. at 3.) The State alleged that Clark had shot and killed Flagstaff Police Officer Jeff Moritz on June 21, 2000. (*Id.*) The trial court found Clark incompetent to stand trial and ordered that he be treated at the Arizona State Hospital until restored to competency. (*Id.* at 156-57.) After Clark received treatment, the trial court found that he had been restored to competency and ordered him to stand trial. (*Id.* at 305.) Clark waived his right to a jury trial and tried the matter to the court. (*Id.* at 324; R.T. 7/28/03, at 2-11.)

A. Facts of the Crime.

At the time of the murder, seventeen-year-old Clark lived with his parents in the University Heights neighborhood of Flagstaff, Arizona. (R.T. 8/5/03, at 95-97.) He had an extreme dislike for police officers and law enforcement. (R.T. 8/7/03, at 58.) In April or May 2000, Jason Tackett,

Clark's classmate at Flagstaff High School, heard Clark mumble to himself at a fast-food restaurant that someone had been arrested unjustly and that he wanted to prove his point to the police. (*Id.* at 17-18.)

"A couple of weeks" before Clark shot Officer Moritz, Clark approached Tackett, who was having a barbeque with acquaintances in Thorpe Park in Flagstaff. (*Id.* at 8-10.) When Tackett greeted Clark, Clark "kind of went off about [how] he wanted to shoot Officer Moritz to get the emergency response out there, and [said] he was going to hide up in the hills with a rifle and start picking them off like a sniper would." (*Id.* at 11.) "Them" referred to police officers. (*Id.*) Clark stated, "If I came up here with my .22 caliber hand pistol . . . and started firing off, when the police come, I will get them out of their cars and start – I have rifles and I'll start shooting them in the head." (*Id.* at 16-17.)

In the early morning hours of June 21, 2000, Clark entered his brother's bedroom while his brother was sleeping and took the keys to his brother's truck. (R.O.A. at 369.) He then repeatedly drove the truck around a nearby neighborhood for about forty minutes, disturbing the residents by blaring loud music from the stereo. (R.T. 8/5/03, at 30, 95, 145-46, 149, 179-80.) In the stereo was a compact disc by the rap artist Dr. Dre. (J.A. at 115-16.) The lyrics of the songs on the disc "contained many antisocial attitudes," including the phrase "fuck the cops." (*Id.* at 116.) Clark circled one block more than twenty times. (R.T. 8/5/03, at 146-48.) Neighbors called 9-1-1 to report the disturbance. (*Id.* at 31, 148.)

Officer Moritz responded to the call at 4:42 a.m. (*Id.* at 88-89.) When he spied the truck, he turned on the patrol

car's emergency lights and siren. (*Id.* at 30, 122, 180.) When Clark did not stop, Officer Moritz reported to the dispatcher, "I have one running on me – running from me on Gillenwater." (*Id.* at 63.) Clark pulled over fifty seconds later, and Officer Moritz gave the dispatcher the truck's license number and stated, "I'll be out with him." (*Id.*) Officer Moritz commanded Clark to stay in the truck. (R.T. 8/6/03, Taylor Transcript, at 49.)

Neighbors heard gunshots – a volley of small caliber shots followed within five seconds by two larger caliber shots. (R.T. 8/5/03, at 29, 67-68, 181.) Thirty seconds after Officer Moritz left his patrol car to approach Clark, he reported to the dispatcher, "999,[1] I've been hit. 999, I've been hit." (*Id.* at 63.) Officer Moritz clutched his chest and stumbled toward a house, calling out, "Help me, somebody help me," and falling on his back after four steps. (*Id.* at 183, 185-86.) He had been shot once in the shoulder, and the bullet had severed a major artery and vein, killing him. (*Id.* at 32, 90-91; R.T. 8/6/03, Partial Transcript, at 8-10.) Clark fled toward his house. (R.T. 8/5/03, at 34, 65; R.T. 8/6/03, Taylor Transcript, at 80.)

Based on the truck's registration, police went to Clark's house and interviewed his parents, who indicated that Clark was missing. (R.T. 8/5/03, at 96-98.) The police began searching the neighborhood. (R.T. 8/6/03, at 115.) At 9:00 p.m., an officer spotted Clark, but Clark eluded him. (*Id.* at 116-17.) Officer Eske, who was stationed at Clark's house, saw Clark crouching behind some rocks near the house at 9:02 p.m. (R.T. 8/7/03, at 61, 63.) Clark began

---

[1] "999" means "officer needs assistance immediately." (R.T. 8/5/03, at 91.)

walking away, looking behind him at a parked police car. (*Id.* at 65.) When Clark observed Officer Eske on the deck of the house, he ran. (*Id.*) Officer Eske chased him. (*Id.* at 66.)

Other police officers joined the chase, yelling at Clark to stop, but he continued running. (*Id.* at 74-75.) One officer illuminated Clark with a flashlight, and another officer pointed his weapon at Clark. (*Id.* at 107.) The officer's weapon had a laser sight, and once the laser alighted on Clark's chest, he surrendered. (*Id.* at 107, 112.) Clark asked, "What's this all about?," and an officer asked him where the gun was. (*Id.* at 81, 119.) Clark replied sarcastically with a forced tone, "What gun? I don't know anything about a gun." (*Id.* at 119-20.)

Clark had gunpowder residue on his hands, and police found a .22 caliber revolver stuffed into a knit cap near a shed in the vicinity. (*Id.* at 94, 114-15.) Biological material on the revolver and the cap contained DNA that matched Clark's DNA. (R.T. 8/8/03, at 66-70.) Ballistics testing established that the revolver had fired the bullet that killed Officer Moritz. (*Id.* at 33.)

B. Clark's Defense.

At the close of the State's evidence, Clark moved for a judgment of acquittal, claiming that the State had failed to prove that he had intended to kill a police officer. (J.A. at 3-4.) In response, the prosecutor recounted the circumstantial evidence that showed that Clark had known that Officer Moritz was a police officer and intended to kill him. (*Id.* at 4.) The trial court denied the motion. (*Id.* at 5-6.)

Clark then raised the affirmative defense of insanity, which, if proved by clear and convincing evidence, would entitle him to a "guilty except insane" verdict and to placement in the Arizona State Hospital rather than imprisonment. (R.T. 8/12/03, at 24.) Clark claimed, however, that (1) Arizona's insanity-defense statute is unconstitutional because the statute omits the "nature and quality" component of the traditional *M'Naghten* Rule; (2) placing the burden of proving insanity on a defendant violates due process; and (3) Arizona's insanity defense statute "shifts the burden of proof to [a defendant] on the specific intent element of [the] crime." (R.O.A. at 374.)

The State responded that the Arizona Supreme Court had held in *State v. Mott*, 931 P.2d 1046, 1050 (Ariz. 1997), that when the Arizona Legislature adopted Arizona's criminal code it specifically rejected the use of psychological testimony to negate mens rea. (R.O.A. at 376.) The State also noted that the Arizona Supreme Court ruled that the Legislature's action did not violate defendants' due process rights. *Mott*, 931 P.2d at 1051-54. (R.O.A. at 376.)

After considering the pleadings and hearing arguments in chambers, the trial judge ruled that *Mott* made evidence of Clark's mental illness inadmissible on the issue of his mens rea. (J.A. at 8-9.) He placed no restriction on the admission of that evidence, however, because "it goes to the insanity issue and because we're not in front of a jury." (*Id.* at 9.) He gave Clark the opportunity to make an offer of proof regarding the relevance of his mental illness to the mens rea:

> At the end, I'll let you make an offer of proof as to the intent, the *Mott* issues, but I still think the supreme court decision is the law of the land in

> this state. . . . I will certainly allow you to preserve the issue; you can argue or not argue, but you can make an offer of proof at the conclusion of the case. . . . And then at least that preserves it on appeal if something happens later down the road.

(*Id.*) Clark's counsel understood the ruling. (R.T. 8/19/03, at 6.)

Clark then presented testimony from classmates, school officials, and his family recounting instances of his bizarre, paranoid, and aggressive behavior during the year preceding the shooting. (R.T. 8/12/03, at 32, 61; R.T. 8/19/03, at 7, 23, 41, 56, 64, 80, 88, 110, 123, 134; R.T. 8/20/03, at 4, 54, 86, 164, 178, 193; R.T. 8/21/03, at 4, 61, 67, 81.) On cross-examination, the witnesses admitted that Clark had used drugs and alcohol during that time. (R.T. 8/12/03, at 52-54, 67-70; R.T. 8/19/03, at 33, 37, 61-62, 74-75, 85-86, 116, 130, 140-41; R.T. 8/20/03, at 47, 50, 77-78, 143, 146, 170-71; R.T. 8/21/03, at 30-31, 64, 79, 90.)

Dr. Barry Morenz also testified. (J.A. at 10.) He had examined Clark, and he stated that Clark suffered from paranoid schizophrenia. (*Id.* at 30.) He observed that Clark had paranoid delusions about aliens, had engaged in bizarre behavior, and had very poor and bizarre hygiene and grooming habits. (*Id.* at 32-33.) He did not believe that Clark was capable of creating an ambush to kill a police officer. (*Id.* at 38-39.) He concluded that Clark had been insane under Arizona law when he shot Officer Moritz:

> [N]o one knows exactly what was on Eric's mind, but given how psychotic he was before and immediately after and everything we know about schizophrenia, I think that it is fair and probable that he did not understand what he was doing

> was, you know – that they [sic] did not understand right from wrong.

(*Id.* at 48-49.)

On cross-examination, however, Dr. Morenz admitted that he could not conclusively state that Clark did not know that killing Officer Moritz was wrong. (*Id.* at 73.) He also admitted that the mere fact that Clark had been psychotic before and after the murder was "alone not enough for an insanity finding." (*Id.* at 90.) He further acknowledged that Clark's creation of a noise disturbance in a quiet neighborhood in the early morning hours was consistent with an intent to lure a police officer to the scene of the murder. (*Id.* at 77-78.)

The State called Dr. John Moran in rebuttal. (*Id.* at 105.) He, too, had examined Clark, and he agreed that Clark was a paranoid schizophrenic. (*Id.* at 136.) But he also concluded to a reasonable degree of psychological certainty that Clark was not insane when he killed Officer Moritz. (*Id.* at 158.) Dr. Moran found that Clark's actions before the shooting – of stealing the keys to his brother's truck, getting the pistol, driving around the neighborhood with loud music blaring – and his actions after the shooting – of eluding the police, hiding the pistol, and surrendering when confronted with weapons – indicated that he appreciated the wrongfulness of his conduct. (*Id.* at 158-67.)

At the conclusion of the evidence, the parties made closing arguments. (*Id.* at 282.) Although Clark's counsel argued that Clark had been insane and had not known right from wrong when he killed Officer Moritz, he made no offer of proof that the evidence of his mental illness negated the mens rea for the crime. (*Id.* at 299.)

The trial court considered the arguments and found that the State had proved beyond a reasonable doubt that Clark shot and killed Officer Moritz. (*Id.* at 332.) The trial court also found that Clark had not proved by clear and convincing evidence that he was insane at the time of the shooting. (*Id.* at 332-34.) The trial court found that while Clark had proved that he suffered from a mental disease or defect, he had failed to prove that he did not know that the killing was wrong. (*Id.* at 333-34.) In making that determination, the trial court specifically relied on (1) Clark's comments about luring police officers weeks before the shooting, (2) the facts showing that Clark had engaged in behavior designed to attract law enforcement, (3) the facts showing that Clark knew that Officer Moritz was a police officer, (4) the facts showing that Clark had fled and had eluded police after the shooting, (5) Clark's disposal of the murder weapon, and (6) Clark's surrender to police at gunpoint. (*Id.*) Thus, the trial court found Clark guilty of first-degree murder. (*Id.*)

The trial court sentenced Clark to life imprisonment without the possibility of release for 25 years. (R.T. 10/2/03, at 73.) Clark moved to vacate the judgment, renewing his claims that Arizona's insanity defense was unconstitutional and that Arizona's decision not to allow psychological evidence to negate mens rea violated his due process rights. (R.O.A. at 406.) He again failed to indicate what evidence of mental illness would have negated mens rea. The trial court denied the motion. (R.O.A. at 424.)

C. Appellate Proceedings.

Clark appealed his conviction and sentence. (J.A. at 337.) He argued, in relevant part, that (1) Arizona's

insanity defense violates due process by eliminating the "nature and quality" component of the *M'Naghten* Rule and (2) Arizona's exclusion of mental disease or defect evidence to negate mens rea violates due process. (*Id.* at 347-48.) The Arizona Court of Appeals rejected those claims and affirmed Clark's conviction and sentence. (*Id.* at 354.)

The court of appeals rejected Clark's first claim for three reasons. (*Id.* at 349.) First, due process does not require a State to provide any insanity defense. (*Id.*) Second, this Court has recognized that States are free to define an insanity defense as they see fit. (*Id.*, citing *Patterson v. New York*, 432 U.S. 197 (1977).) Third, the "nature and quality" component does not add significantly to the insanity test because "[i]t is difficult to imagine that a defendant who did not know the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (*Id.* at 349-50.)

The court of appeals rejected Clark's second claim for two reasons. (*Id.* at 351-52.) First, Clark made no offer of proof to the trial court that he was incapable of knowing that he was killing a police officer. (*Id.* at 352.) Second, even if he had proffered such evidence, the court of appeals, like the trial court, was bound to follow the Arizona Supreme Court's decision in *Mott*. (*Id.*)

Clark sought discretionary review of the court of appeals' decision in the Arizona Supreme Court, but the supreme court denied review without comment. (*Id.* at 355.)

SUMMARY OF THE ARGUMENT

1. Arizona's definition of insanity does not violate due process. Arizona's insanity test is whether a person has a "mental disease or defect" so severe that the person "did not know the criminal act was wrong." Arizona Revised Statutes § 13-502(A). Clark argues that this definition violates due process because it does not allow a defendant to be judged insane if he did not understand the "nature and quality of his act," a traditional component of the *M'Naghten* Rule. He calls for this Court to establish as the constitutional minimum definition of insanity one that includes a "nature and quality" component.

But this Court has steadfastly resisted calls to "constitutionalize" the insanity defense and has never said that States are required to adopt one. *Medina v. California*, 505 U.S. 437, 449 (1992). In doing so, this Court has recognized that the States have the primary responsibility to prosecute crimes and the concomitant freedom to define elements of offenses and affirmative defenses. This Court has been especially chary of establishing constitutional rules regarding the use of psychological evidence in determining guilt or innocence and criminal responsibility because the meaning and relevance of that evidence is so variable and uncertain to psychiatrists and lawyers alike. Mandating any definition of insanity under the Due Process Clause would infringe upon the States' historic authority to control and define the substantive criminal law and would freeze the relationship of psychiatry and law into a particular constitutional mold that scientific, legal, and philosophical advances and changes could readily render obsolete.

Moreover, nothing indicates that the "nature and quality" component of the *M'Naghten* Rule is a fundamental principle of justice worthy of the Due Process Clause's protection. The "nature and quality" component is not even fundamental to the *M'Naghten* Rule itself. While the *M'Naghten* opinion used the phrase "nature and quality," the heart of the *M'Naghten* Rule is whether the defendant knew that his conduct was wrong – the very test that Arizona uses. Historically, States have defined the *M'Naghten* Rule using various phrases centering on whether a defendant knew that his conduct was wrong. This Court has even referred to the *M'Naghten* Rule as the "right-wrong" test. *Powell v. Texas,* 392 U.S. 514, 537 (1968) (plurality opinion). Moreover, some courts historically omitted the "nature and quality" component of the *M'Naghten* Rule, and some courts and legal scholars believe that the question whether a person knew that his conduct was wrong subsumes the question whether the person understood the "nature and quality of his act." As the Arizona Court of Appeals noted in resolving this case, "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (J.A. at 350.) Due process therefore does not require States to include a "nature and quality" component in their insanity definitions.

2. Due process does not require Arizona to admit psychological evidence to negate the mens rea of a crime. Clark claims that precluding him from presenting evidence of his mental illness violated due process because it prevented him from presenting a defense. But this Court should not even consider his claim because the Arizona Court of Appeals resolved it on the state-law procedural ground of

waiver. Clark presented the evidence of his mental illness to prove the affirmative defense of insanity, but he never demonstrated to the trial court – even after the trial court invited him to make an offer of proof – how that evidence was relevant to the mens rea element of his murder charge (whether he intentionally or knowingly killed a police officer acting in the line of duty). Evidence that a defendant may be insane does not necessarily prove lack of mens rea, and Clark never showed the trial court a connection between his mental illness and his alleged inability to know that he was killing a police officer. The Arizona Court of Appeals found that Clark did not make an adequate offer of proof (J.A. at 351-52), and this Court should not consider the merits of Clark's claim.

Even if this Court considers the merits, however, Clark is wrong that he has a due process right to present his psychological evidence to negate the mens rea of murder. This Court has considered this precise issue three times – in *Troche v. California*, 280 U.S. 254 (1929) (per curiam); *Coleman v. California*, 317 U.S. 596 (1942) (per curiam); and *Fisher v. United States*, 328 U.S. 463 (1946). This Court dismissed the appeals in the first two cases for want of a substantial federal question – indicating its approval of the California Supreme Court's rulings that Troche and Coleman had no due process right to admit evidence of their mental illnesses to negate the mens rea of murder. This Court then recognized in *Fisher* that requiring the District of Columbia to instruct jurors that they could consider evidence of Fisher's mental illness on the issue of mens rea would force the District to adopt a "diminished capacity" defense, which was "properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." 328 U.S. at

476. States historically have had the authority to regulate the admission of evidence and to define crimes, particularly with regard to matters pertaining to psychological evidence. Requiring States to admit psychological evidence on the issue of mens rea when they have chosen not to do so invades the States' province of defining and regulating criminal law.

State courts and State legislatures have for many reasons prohibited the admission of psychological evidence to negate mens rea. Some States share this Court's wariness of such evidence. Some States have determined that permitting a "diminished capacity" defense in this sense is unwarranted or is bad public policy. Some States want to protect society through "guilty-except-insane" verdicts rather than to create the risk that mentally ill criminals could be set free with no requirement of treatment. This Court has always respected the States' right to regulate such matters.

When the Arizona Legislature enacted its criminal code, it specifically rejected a provision that would have allowed a defendant's psychological condition to negate the mens rea. By doing so, it defined mens rea in Arizona without regard to a defendant's psychological condition, making any evidence of a defendant's psychological condition irrelevant to mens rea. This comports with due process, as this Court recognized in the analogous decision of *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion). There, this Court found no due process violation when the Montana Legislature defined its mens rea elements without regard to the condition of voluntary intoxication. *Id.* at 58 (Ginsburg, J., concurring). Because a defendant's psychological condition does not negate mens rea in Arizona, Clark suffered no due process violation

when the trial court refused to consider his psychological evidence on the mens rea issue.

ARGUMENT

I. The Fourteenth Amendment's Due Process Clause Does Not Require a State to Enact the Complete *M'Naghten* Rule as the Test for Insanity Because No Fundamental Principle of Justice Requires a State to Enact an Insanity Defense or Any Particular Definition of Insanity.

In 1993, the Arizona Legislature amended its insanity statute, Arizona Revised Statutes § 13-502(A), to delete reference to the defendant's knowledge of the "nature and quality" of his act. 1993 Ariz. Sess. Laws, ch. 256, § 2. The new insanity test is simply whether the defendant had such a severe mental disease or defect that he "did not know the criminal act was wrong." 1993 Ariz. Sess. Laws, ch. 256, § 3. Clark contends that this legislative decision violates due process. (Petitioner's Opening Brief at 32.) He claims that due process requires a State to adopt as the test for insanity the entire traditional *M'Naghten* Rule, which includes a "nature and quality" component. (*Id.* at 40.)

Clark's claim contravenes this Court's understanding of due process and violates the States' historical authority to define elements of criminal offenses and affirmative defenses, particularly insanity defenses. Moreover, Clark's argument fails regardless of any due process requirement because Arizona's insanity definition necessarily encompasses the question whether a defendant understood the nature and quality of his act.

A. "Constitutionalizing" a Particular Insanity Defense Violates the States' Historical Authority to Define Elements of Criminal Offenses and Affirmative Defenses.

The Due Process Clause does not prohibit the Arizona Legislature from choosing to define insanity only in terms of whether a defendant knows his conduct is wrong: "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). State legislative judgments in this area are due "substantial deference" because States have "considerable expertise" regarding criminal law and procedure, and the criminal process is "grounded in centuries of common-law tradition." *Medina v. California*, 505 U.S. 437, 445-46 (1992). A State's legislative choice in ordering its criminal justice system will not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958)). Establishing that a fundamental principle exists is a "heavy burden" that is primarily guided by historical practice. *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion).

Assessing and assigning accountability for "antisocial deeds" always has been the States' prerogative:

> The doctrines of actus reus, mens rea, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving

> aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. The process of adjustment has always been thought to be the province of the States.

Powell v. Texas, 392 U.S. 514, 536 (1968) (plurality opinion). Thus, States have the "freedom to determine whether, and to what extent, mental illness should excuse criminal behavior." *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring); *id.* at 91 ("The power of the States to determine the existence of criminal insanity following the establishment of the underlying offense is well established.") (Kennedy, J., dissenting). This Court has never "said that the Constitution requires the States to recognize the insanity defense." *Medina*, 505 U.S. at 449.

This Court addressed the application of due process to States' insanity defenses in *Leland v. Oregon*, 342 U.S. 790 (1952). In that case, Leland argued that due process prohibited Oregon from requiring him to prove the affirmative defense of insanity beyond a reasonable doubt. *Id.* at 793. He also claimed that Oregon had violated due process by enacting a statute prohibiting what amounted to an "irresistible impulse" defense. *Id.* at 800. Regarding the burden-of-proof issue, the Court had unhesitatingly held that requiring a defendant to prove insanity beyond a reasonable doubt does not violate due process. *Id.* at 799.

Regarding Oregon's prohibition of an "irresistible impulse" test for insanity, the Court specifically declined to impose any constitutionally mandated insanity defense. The Court noted that "[k]nowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions," *id.* at 800, and that psychiatry

had not progressed to a point that would compel the Court to hold that the "concept of ordered liberty" required States to adopt instead the "irresistible impulse" test, *id.* at 801. The choice of a test for legal insanity "involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement. . . ." *Id.*

Justices Frankfurter and Black, while dissenting on the burden-of-proof issue, agreed that due process does not require a State to adopt any particular insanity defense because "[s]anity and insanity are concepts of incertitude" "given varying and conflicting content at the same time and from time to time by specialists in the field." *Id.* at 803. The Justices found that at the existing state of scientific knowledge, "it would be indefensible to impose upon the States, through the due process of law, . . . one test rather than another . . . , and thereby to displace a State's own choice of such a test." *Id.*

In *Powell*, the Court again considered the States' authority to determine substantive rules for criminal responsibility. Texas had criminalized public drunkenness, and Powell claimed that his conviction for that offense violated the Eighth Amendment because his chronic alcoholism made it impossible for him to avoid public drunkenness. 392 U.S. at 531. Powell attempted to bring his case within the ambit of *Robinson v. California,* 370 U.S. 660, 667 (1962), which held that the Eighth Amendment prohibits a State from punishing a person for his status as a narcotics addict. *Powell*, 392 U.S. at 532. The Court rejected the claim, noting that Texas was punishing him for public drunkenness, not for his status as a chronic alcoholic. *Id.*

The Court also recognized that accepting Powell's argument would mean that any defendant who presented evidence of volitional impairment would state a constitutional claim if the State did not recognize such a defense and based its criminal responsibility determination on "some different and perhaps lesser standard, e.g., the right-wrong test of M'Naghten's Case." *Id.* at 536. This would establish a "constitutional doctrine of criminal responsibility," *id.* at 534, invading the States' historical "province" to assign criminal responsibility, *id.* at 536. This Court refused to "constitutionalize" an insanity test: "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* "Constitutionalizing" an insanity test would inhibit States from experimenting with different techniques to deal with social problems:

> [F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet time to write the Constitutional formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or lawyers.

Id. at 536-37; *see also id.* at 546 (Black, J., concurring) ("[T]o impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.").

Skepticism about the certainty of psychiatric evidence has continued since *Leland* and *Powell*. *See Jones v. United States,* 463 U.S. 354, 365 n.13 (1983) ("The only certain thing . . . about the present state of knowledge and therapy regarding mental disease is that science has not

reached finality of judgment.") (quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956)). Given the scientific uncertainty regarding psychiatric knowledge, "courts should pay particular deference to reasonable legislative judgments." *Id.*

But imposing a "constitutional formula" for the definition of insanity in the face of this uncertainty is exactly what Clark now urges. Clark argues that due process prohibits a State from enacting a definition of insanity narrower than the complete *M'Naghten* Rule. (Petitioner's Opening Brief at 40.) To satisfy his heavy burden of proving that the complete *M'Naghten* Rule is a fundamental principle of justice, Clark relies on the obvious historical fact that judicial systems have long considered mental illness in determining criminal responsibility and claims that a majority of States have enacted an insanity defense that includes the complete *M'Naghten* Rule or a "broader" test. (Petitioner's Opening Brief at 34-39.)

Neither justification supports mandating the *M'Naghten* Rule as the constitutional test for insanity. While judicial systems have always considered mental illness in some fashion and to some degree in determining criminal responsibility, nothing in Clark's historical recitation establishes any particular way of accounting for mental illness – much less any particular definition of insanity – as fundamental to justice. English courts began exempting the mentally ill from punishment for their criminal acts using a cognitive – "wild beast" – test in *Rex v. Arnold*, 16 How. St. Tr. 695 (10 George I A.D. 1724); moved to a test whether the mental illness "caused" the criminal act in *Rex v. Hadfield*, (K.B. 1800) 27 St. Tr. 1281 (1820); and then returned in *M'Naghten*'s case to a

cognitive test of knowing right from wrong in *Regina v. M'Naghten*, 4 St. Tr. 847 (1843). *See* Rita J. Simon & David E. Aaronson, *The Insanity Defense* 10-14 (Praeger 1988).

American jurisdictions enacted various tests, from formulations of the *M'Naghten* Rule to the "irresistible impulse" test to the "product" test of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), or some combination thereof. *See Insanity Defense*, *supra*, at 14-19. In 1962, the American Law Institute proposed an insanity test requiring proof that a defendant lacked "substantial capacity" "either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law" because of a mental disease or defect. American Law Institute, *Model Penal Code*, § 4.01 (Philadelphia: A.L.I. 1962). Some States have adopted this definition in some form. (Petitioner's Opening Brief at 38 n.42). One State – New Hampshire – provides no definition of insanity. *See Abbott v. Cunningham*, 766 F. Supp. 1218, 1226 (D.N.H. 1991) (upholding insanity statute against due process challenge). Other States have chosen to abolish the insanity defense altogether. *See State v. Searcy*, 798 P.2d 914, 916 (Idaho 1990); *State v. Bethel*, 66 P.3d 840, 844 (Kan. 2003); *State v. Korell*, 690 P.2d 992, 996 (Mont. 1984); *State v. Herrera*, 895 P.2d 359, 361 (Utah 1995). The continuing debate about the appropriate definition of insanity among the States demonstrates that it is still "not yet time to write" a "Constitutional formula[]" for insanity. *Powell*, 392 U.S. at 537.

Clark portrays the *M'Naghten* Rule's "nature and quality" component as significant and immutable. (Petitioner's Opening Brief at 33-37.) But that is inaccurate. Older court decisions phrased the *M'Naghten* Rule merely in terms of knowing right from wrong or good from evil.

See Henry Weihofen, *Mental Disorder as a Criminal Defense* 68-69 (Dennis & Co. 1954) (collecting cases). Other courts described the Rule variously as whether the person had the capacity to know his act was wrong, whether the person was conscious that he was doing what he ought not do, whether the person had sufficient reason to know he was doing a wrong act, or some other permutation of these phrases. *See id.* at 69-71. And although the *M'Naghten* opinion itself uses the phrase "nature and quality" in its discussion of the proper test for insanity, the opinion makes clear that the primary question is the knowledge of right and wrong:

> If the accused was conscious that the act was one which he ought not to do, and if that act was [contrary to law], he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong: and this course we think is correct.

M'Naghten, 4 St. Tr. at 932 (quoted in *Mental Disorder*, *supra*, at 61). This Court, too, has referred to the *M'Naghten* Rule as the "right-wrong" test. *Powell*, 392 U.S. at 537; *Leland*, 343 U.S. at 800 ("right and wrong").

While "nature and quality" has been included as part of the *M'Naghten* Rule in many cases in various phrasings, *see Mental Disorder*, *supra*, at 71 (collecting cases), historically it has not been viewed as an essential component of the Rule, *see* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 36, at 277 (West 1972) ("[I]n many jurisdictions the M'Naghten rule is stated merely in terms of the defendant's ability to distinguish right from wrong, and there is no mention of or instruction on knowledge of the nature and quality of the act."). This fact, along with

the fact that jurisdictions have changed definitions of insanity – or in some instances eliminated the defense altogether – based on changes in views on the role mental illness should play in criminal justice systems, demonstrates that the *M'Naghten* Rule, complete or partial, is not a fundamental principle of justice due process protects.

Clark claims that a "vast majority" of States have defined insanity to include some concept equivalent to the *M'Naghten* Rule's "nature and quality" component. (Petitioner's Opening Brief at 37-39.) But only a minority of States – twenty – have such a component. Clark counts as part of his majority the seventeen States that have adopted some version of the American Law Institute's insanity definition, which requires, in relevant part, proof that a defendant lacked "substantial capacity" to "appreciate the criminality (wrongfulness) of his conduct." *Model Penal Code*, § 4.01. This definition has no concept equivalent to "nature and quality." In fact, it reinforces the fact that knowledge of wrongfulness alone *is* a common test for insanity. Moreover, that a number of States have a particular definition carries little weight in due process analysis. *See Leland*, 343 U.S. at 798 (due process did not prohibit a State from requiring that insanity be proved beyond a reasonable doubt even though only one State – Oregon – had done so). Because Clark has failed to carry his "heavy burden" of proving that the *M'Naghten* Rule's "nature and quality" component is a fundamental principle of justice, Arizona's insanity statute comports with due process.

B. Arizona's Definition of Insanity Necessarily Encompasses the Question Whether a Defendant Understood the Nature and Quality of His Act.

Although Clark's due process argument fails as a matter of constitutional law, it also fails as a matter of fact. Even if due process did require Arizona to include in its insanity definition the question whether the defendant understood the nature and quality of his act, Arizona's definition necessarily encompasses that question. Arizona's definition of insanity requires proof that the defendant "was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." Arizona Revised Statutes § 13-502(A). Arizona defines "wrong" in this context according to "community standards of morality," which includes an understanding that the act is legally and morally wrong. *State v. Corley*, 495 P.2d 470, 473 (Ariz. 1972); *see also State v. Tamplin*, 986 P.2d 914, 916-17 (Ariz. App. 1999) (definition of "wrong" remains the same under current insanity statute).

Knowledge that the act is legally and morally wrong necessarily requires an understanding of the act's nature and quality as set forth in the *M'Naghten* Rule. As the court of appeals recognized in this case, "It is difficult to imagine that a defendant who did not appreciate the 'nature and quality' of the act he committed would reasonably be able to perceive that the act was 'wrong.'" (J.A. at 350.) Other courts concur in this judgment. *See Maas v. Territory*, 63 P. 960, 961 (Okla. 1901) ("[K]nowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same."); *Montgomery v. State*, 151 S.W. 813, 817 (Tex. Cr. App. 1912) ("[I]t is almost inconceivable that a man could be sane

enough to appreciate and know the nature and quality of an act and yet not know whether it was right or wrong to commit such an act."); *Jessner v. State*, 231 N.W. 634, 639 (Wis. 1930) ("[T]he two phrases express exactly the same thing, but in different languages."). Legal scholars as well have concluded that knowing whether conduct is wrong encompasses understanding the conduct's "nature and quality." *See Insanity Defense*, *supra*, at 14; Abraham S. Goldstein, *The Insanity Defense* 49 (Yale University Press 1967); Gregory Zilboorg, *Misconceptions of Legal Insanity*, 9 Am. J. Orthopsychiatry 540, 552-53 (1939). The Arizona Supreme Court recognized that the "right-wrong" component of the *M'Naghten* Rule subsumes the "nature and quality" component when it declined to reverse a conviction because a jury instruction on insanity omitted the "nature and quality" language. *State v. Chavez*, 693 P.2d 893, 894 (Ariz. 1984). Even Clark's amicus curiae concedes that (1) Arizona appears to have defined knowledge that conduct is right or wrong sufficiently broadly to include within that definition an understanding of the act's nature and quality, and (2) this satisfies any due process requirement. (Brief of Amicus Curiae American Psychiatric Association, American Psychological Association, and American Academy of Psychiatry and the Law at 27-28.)

Consequently, even if due process required a State's insanity defense to include the *M'Naghten* Rule's "nature and quality" component, Arizona complies with that requirement. Arizona's insanity statute therefore does not violate due process.

II. The Fourteenth Amendment's Due Process Clause Does Not Prohibit a State from Defining Mens Rea Without Regard to Mental Disease or Defect Because No Fundamental Principle of Justice Requires a State to Account for Mental Disease or Defect in Any Particular Way.

In *State v. Mott*, Mott wanted to defend against charges of child abuse and felony murder by presenting evidence that she suffered from Battered Woman's Syndrome, which prevented her from intentionally or knowingly permitting her boyfriend to beat her child to death. 931 P.2d at 1049. She claimed that the trial court violated due process by excluding that evidence. *Id.* The Arizona Supreme Court rejected her claim, ruling that when the Arizona Legislature had enacted Arizona's criminal code, it had specifically declined to adopt a defense of "diminished capacity" – defined as evidence of mental disease or defect that negates a crime's mens rea. *Id.* at 1050.

Clark claims that the trial court's decision to follow *Mott* and to refuse to consider his mental disease or defect evidence in determining whether he had the requisite mens rea for first-degree murder violated due process because it denied him the opportunity to present a defense.[2] (Petitioner's Opening Brief at 13.) This Court

---

[2] Clark also claims that excluding his evidence of mental disease or defect prevented him from providing innocent explanations for his behavior to refute the State's case that his actions proved his intent to kill a police officer. (Petitioner's Opening Brief at 13.) To the extent that this is a separate argument, Clark never presented it to the Arizona Court of Appeals in his opening brief or to this Court in the Petition for Writ of Certiorari. Because the argument was not "pressed or passed upon" in the state appellate court or raised at the certiorari stage, this Court should decline to consider it. *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) ("We decline to address . . . questions which were neither

(Continued on following page)

should reject this contention for two reasons. First, this Court should not even consider the claim because the Arizona Court of Appeals resolved it on independent state-law grounds. Second, no fundamental principle of justice prohibits Arizona from defining the mens rea element without regard to mental disease or defect.

A. The Arizona Court of Appeals Resolved Clark's Claim on Independent State-Law Grounds.

State courts are "the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The interests of comity and federalism require this Court to defer to state court decisions on state-law issues. *See Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."). The Arizona Court of Appeals ruled that Clark had waived his claim under state law. (J.A. at 352.) In the interest of comity and federalism, this Court should decline to consider this claim.

The Arizona Court of Appeals resolved Clark's claim on state-law grounds. The court noted that the trial court had not prevented Clark from presenting psychological evidence, despite *Mott*'s holding to the contrary, and had

---

raised nor decided below, and were not presented in the petition for writ of certiorari."); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) ("[I]t is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.").

invited him to make an offer of proof regarding the evidence's relevance to his mental state. (J.A. at 351-52.) The court then explained that "aside from the evidence to prove his insanity generally, Clark specified no evidence in his offer of proof[3] that demonstrated he was not capable of knowing he was killing a police officer." (*Id.* at 352.) Although Clark had presented evidence that he was a paranoid schizophrenic – obviously relevant to his insanity defense – he was silent before the trial court about how that evidence might have shown that he did not knowingly kill a police officer. Insanity and mens rea are separate issues:

> Although as the state court's instructions in *Leland* recognized, evidence relevant to insanity may also be relevant to whether the required mens rea was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.

Wilbur, 421 U.S. at 705-06 (Rehnquist, J., concurring) (internal citation omitted). Consequently, Clark had the duty – and the trial court gave him the opportunity – to show the relevance of his mental disease or defect evidence to whether he knew he was killing a police officer so that the state appellate court could evaluate his due process claim.

By failing to draw any connection between his evidence and the fact he wanted to prove, Clark waived this

---

[3] Clark effectively conceded below that he made no "offer of proof." (*See* Respondent's Appendix I to the Response to Petition for Writ of Certiorari at 20.) The court of appeals apparently was referring to Clark's closing argument at trial on the insanity defense.

claim on appeal, as the court of appeals found. (J.A. at 352.) *See State v. Gulbrandson*, 906 P.2d 579, 592 (Ariz. 1995) ("Defendant did not properly preserve this issue for appeal because his counsel failed to make an offer of proof" concerning the defense expert's testimony of the defendant's mental state of mind at the time of the offense); *State v. Walton*, 769 P.2d 1017, 1027-28 (Ariz. 1989) (evidence concerning a witness's psychiatric history need not be admitted if "the defendant fails to make an offer of proof that the witness' perception or memory was affected by [a mental] illness"); *State v. Fendler*, 622 P.2d 23, 36 (Ariz. App. 1980) (defendant's claim that he was precluded from introducing relevant evidence of his intent "fail[ed] for lack of an adequate offer of proof"). Waiver is an independent and adequate state-law ground. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (waiver "amounted to an independent and adequate state procedural ground which would have prevented direct review" in this Court). Although the court of appeals did not use the word "waiver" in its decision, particular wording is not required to find an independent and adequate state-law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (a state court need not use "particular language" in making procedural default ruling that constitutes independent and adequate state grounds). Because the state appellate court resolved this issue on state-law grounds, this Court should decline to consider it.

B. No Principle of Justice Requires a State to Admit Evidence of Mental Disease or Defect to Negate Mens Rea Because States Are Free to Define Elements of Criminal Offenses Without Regard to Mental Disease or Defect.

Clark contends that due process requires Arizona to admit his mental disease or defect evidence to allow him to negate the mens rea of his crime. (Petitioner's Opening Brief at 13.) He says this is so because it violates fundamental principles of justice to prevent him from refuting the State's case with relevant evidence. (*Id.* at 13-22.) His argument fails, however, because States historically have had the authority to define the elements of criminal offenses, and a State's particular definition of an element may render certain evidence – including mental disease or defect evidence – irrelevant. Arizona has chosen to define the element of mens rea in such a way that evidence of a defendant's mental disease or defect does not negate it. This choice does not violate due process.

1. Due process does not require the admission of mental disease or defect evidence when a State has defined criminal offenses in such a way that mental disease or defect evidence is irrelevant.

States historically have had broad authority to define the substantive elements of criminal offenses. *See Medina*, 505 U.S. at 445 (States are due "substantial deference" in "matters of criminal procedure and the criminal process"); *Patterson*, 432 U.S. at 201-02 ("preventing and dealing with crime" is the States' "business"); *Powell*, 392 U.S. at 535-36 (doctrines of actus reus and mens rea have "always

been thought to be the province of the States"). Defining an element in a certain way may make particular evidence irrelevant to the crime because the evidence does not prove or negate that element. *See Egelhoff*, 518 U.S. at 58 (Ginsburg, J., concurring) (voluntary intoxication evidence was irrelevant to negate mens rea because Montana defined mens rea without regard to voluntary intoxication). A State's decision in this area "is not subject to proscription under the Due Process Clause" unless it violates a fundamental principle of justice. *Patterson*, 432 U.S. at 201-02.

Three times this Court has considered whether due process requires a State to admit mental disease or defect evidence to negate mens rea when it is irrelevant under state law – the precise question Clark now brings – and each time the Court has found no due process violation. *See Troche v. California*, 280 U.S. 254 (1929) (per curiam); *Coleman v. California*, 317 U.S. 596 (1942) (per curiam); *Fisher v. United States*, 328 U.S. 463 (1946). *Troche* and *Coleman* each dealt with California's then-existing bifurcated trial system, in which a jury first tried a defendant's guilt presuming his sanity and then, if it found the defendant guilty and if the defendant claimed insanity, it tried the insanity issue. *People v. Troche*, 273 P. 767, 769 (Cal. 1929); *People v. Coleman*, 126 P.2d 349, 352 (Cal. 1942). Troche and Coleman claimed that this procedure violated due process because it prevented them from introducing evidence of mental illness in the trial's guilt phase to negate the mens rea elements of their crimes but allowed such evidence only at the insanity phase. *Troche*, 273 P. at 771; *Coleman*, 126 P.2d at 352. In each case, the California Supreme Court found that this procedure did not violate due process because California had determined that

evidence not rising to the level of insanity did not negate the mens rea. *Troche*, 273 P. at 772 (evidence "irrelevant and immaterial"); *Coleman*, 126 P.2d at 353 (relying on *Troche*).

Troche and Coleman each appealed their cases to this Court, which dismissed them for "want of substantial Federal question." *Troche*, 280 U.S. at 524; *Coleman*, 317 U.S. at 598. While the Court did not provide an analysis, summary dismissal of the appeals indicated its agreement with the California Supreme Court's holdings that California did not violate due process by precluding Troche and Coleman from presenting their evidence of mental illness on the mens rea element at the guilt-phase of their trials.[4] *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (summary dismissals of appeals are decisions on the merits and are accorded proper precedential effect).

The Court considered this issue again in *Fisher*. Fisher, on trial for premeditated murder in the District of Columbia, presented psychiatric evidence that he was "unable by reason of a deranged mental condition" to resist the impulse to kill the victim. 328 U.S. at 467. Although Fisher conceded that he was sane, he requested an instruction – refused by the trial court – that the jurors should "consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics" in judging whether he had premeditated and had intended to kill. *Id.* at 469 n.5. Fisher asked the Court to declare that mental disease or defect evidence that falls

---

[4] Troche and Coleman's precise arguments are set forth in *Muench v. Israel*, 715 F.2d 1124, 1138-40 (7th Cir. 1982) (relying on an examination of the papers before this Court in each case).

short of insanity is nevertheless "a rel[e]vant factor" in determining whether a defendant is guilty of first-degree murder or a lesser degree of homicide. *Id.* at 473.

In rejecting Fisher's request, the Court first noted that some jurisdictions had accepted this "partial responsibility" theory and some had not. *Id.* at 473 & n.12. The Court then refused to intervene in the District of Columbia's administration of its criminal justice system:

> Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. The administration of criminal law matters not affected by Constitutional limitations or a general federal law is a matter peculiarly of local concern.

Id. at 476. In so ruling, this Court effectively reaffirmed its holdings in *Troche* and *Coleman* that due process does not require the admission of mental disease or defect evidence against mens rea when it is irrelevant.

Clark does not address *Troche* or *Coleman* and argues merely that *Fisher* does not hold what it clearly does hold. Clark contends that *Fisher* does not affect his argument because Fisher was allowed to present his evidence of mental disease to the jurors. (Petitioner's Opening Brief at 25.) He claims that *Fisher*'s sole issue was whether Fisher was entitled to an affirmative instruction that jurors should consider the evidence on the mens rea element, not whether the District of Columbia properly excluded the evidence. (*Id.*) But "*Fisher* stands for no such thing. *Fisher* squarely confronted the substance of the theory: the Court was not quibbling with the proffered instruction on redundancy grounds." *Muench v. Israel*, 715 F.2d 1124, 1141-42

(7th Cir. 1982). The Court believed that ruling in Fisher's favor required the District of Columbia to adopt a theory of criminal responsibility that it had not yet adopted: "For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility." *Fisher*, 328 U.S. at 476. And Justice Murphy, while dissenting from the result, precisely identified the issue before the Court: "May mental deficiency not amounting to complete insanity properly be considered by the jury in determining whether a homicide has been committed with the deliberation and premeditation necessary to constitute first degree murder?" *Id.* at 491 (Murphy, J., dissenting). Despite Clark's contrary argument, *Fisher* stands for the proposition that due process does not require a State to admit mental disease or defect evidence to negate mens rea. "Any contrary conclusion would render *Fisher* virtually meaningless, if not disingenuous." *Muench*, 715 F.2d at 1142. *Fisher* must be taken "at its word." *Id.*

In an attempt to show that historical practice required the admission of mental disease or defect evidence on the issue of mens rea, Clark argues that the Framers considered the lack of mens rea as the basis for excusing the insane from criminal responsibility. (Petitioner's Opening Brief at 27-32.) But while the early English legal scholars indeed linked insanity to the lack of mens rea, "the insanity defense is broader than the mens rea concept." Frederica B. Koeller, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 12 U. Pa. L. Rev. 733, 734 (1964). "There is no necessary connection between a judgment about a defendant's criminal responsibility and his mental capacity to entertain the state of mind" the crime requires.

Peter Aranella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 Col. L. Rev. 827, 834 (Oct. 1977). For example, a person may be deluded about the circumstances requiring a murder – God told him to kill his neighbor over tea – and properly found insane, but he nonetheless has the requisite mens rea to commit murder. *See id.* at 833-34. Even the celebrated cases near the time of the Founding – *Rex v. Arnold* and *Rex v. Hadfield* – did not involve questions of lack of intent to kill, but questions whether the defendants suffered from delusions. *See* Daniel N. Robinson, *Wild Beasts & Idle Humours*, 129-35, 147-49 (Harvard University Press 1996). Thus, Clark is wrong that insanity was historically coterminous with lack of intent, and consequently no historical principle of justice ever required the admission of mental disease evidence to negate mens rea. Absent such a principle of justice, a State does not violate due process by defining the elements of its criminal offenses such that mental disease or defect evidence does not negate them.

2. Arizona has chosen to define its mens rea elements without regard to mental disease or defect, making such evidence irrelevant to mens rea.

In keeping with a State's authority to define the elements of its criminal offenses, Arizona has defined the mens rea element in such a way that a defendant's mental disease or defect does not negate the mens rea of a crime. The Arizona Supreme Court recognized this in *Mott*. 931 P.2d at 1050. The supreme court noted that when the Arizona Legislature enacted its criminal code, based largely on the Model Penal Code, it specifically rejected

the Code's provision allowing the admission of evidence of "mental disease or defect" to negate mens rea. *Id.* "The legislature's decision not to adopt this section of the Model Penal Code evidences its rejection of the uses of psychological testimony to challenge the mens rea element of a crime." *Id.* The court further noted that the Legislature had never adopted a defense of "diminished capacity," in which a mental disease or defect not rising to the level of insanity can excuse criminal responsibility. *Id.* at 1051. "Consequently, Arizona does not allow evidence of a defendant's mental disorder short of insanity either as an affirmative defense or to negate the mens rea element of a crime." *Id.*

The Arizona Legislature's rejection of the Model Penal Code provision means that the mens rea elements of criminal offenses are defined without regard to mental disease or defect. Thus, when determining whether a defendant has intentionally or knowingly committed a criminal act, any mental disease or defect is statutorily irrelevant to the factual question. The question for the factfinder becomes whether the defendant (1) actually intended to commit the act or knew that he was committing the act or (2) committed the act under circumstances that would otherwise establish intent or knowledge but for the defendant's mental disease or defect.

This Court approved and applied this very analysis in *Egelhoff*. Egelhoff, convicted of murder, claimed that Montana's statute making evidence of voluntary intoxication irrelevant to mens rea violated due process on grounds similar to Clark's. 518 U.S. at 41 (plurality opinion). The Montana Supreme Court reversed his convictions, finding that precluding him from presenting voluntary intoxication evidence on the issue of mens rea

violated his due process right to have "all relevant evidence" admitted to rebut the State's case, and improperly eased the State's burden of proving the mens rea element beyond a reasonable doubt. *Id.* at 41, 51-55. A plurality of this Court ruled that Montana had not violated due process, recognizing that no fundamental principle of justice prohibits a State from precluding the admission of voluntary intoxication evidence. *Id.* at 44-56. The plurality noted that a State could exclude that evidence either by evidentiary rule or by substantively amending the mens rea element so that evidence of voluntary intoxication does not negate it. *Id.* at 50 n.4.

Justice Ginsburg, concurring in the plurality's judgment and providing the majority vote, agreed with the plurality only on the narrow ground that Montana had redefined the mens rea element of its criminal offenses so that voluntary intoxication evidence did not negate that element. *Id.* at 58 (Ginsburg, J., concurring). Justice Ginsburg noted that "States enjoy wide latitude in defining the elements of offenses, particularly when determining 'the extent to which moral culpability should be a prerequisite to conviction for a crime.'" *Id.* (quoting *Powell*, 392 U.S. at 545 [Black, J., concurring]) (internal citation omitted). Justice Ginsburg recognized that Montana had redefined mens rea to be determined based on objective facts and circumstances – rather than on the subjective state of mind – in cases in which the defendant was voluntarily intoxicated:

> Thus, in a prosecution for deliberate homicide, the State need not prove that the defendant purposely or knowingly cause[d] the death of another[] in a purely subjective sense. To obtain a conviction, the prosecution must prove only that

> (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed under circumstances that would otherwise establish knowledge or purpose but for [the defendant's] voluntary intoxication.

Id. (internal citations and quotation marks omitted).

Two of the dissenting Justices agreed with the plurality and Justice Ginsburg that States could redefine mens rea elements to make the condition of voluntary intoxication irrelevant. Justice O'Connor stated that "[a] state legislature certainly possesses the authority to define the offenses it wishes to punish. If the Montana Legislature chose to redefine this offense so as to alter the requisite mental-state element, the due process problem presented in this case would not be at issue." *Id.* at 71 (O'Connor, J., dissenting). Justice Souter stated, "I have no doubt that a State may so define the mental element of an offense that evidence of a defendant's voluntary intoxication at the time of commission does not have exculpatory relevance and to that extent, may be excluded without raising any issue of due process." *Id.* at 73 (Souter, J., dissenting). Justices O'Connor and Souter did not agree, however, that Montana had in fact redefined the mens rea element to make voluntary intoxication irrelevant; the Montana Supreme Court found as a matter of state law that evidence of voluntary intoxication *was* relevant to the issue of mens rea, and they felt bound by the Montana Supreme Court's determination of state law. *Id.* at 71-72 (O'Connor, J., dissenting); *id.* at 73 (Souter, J., dissenting).

Under the analysis of the plurality and Justices Ginsburg, O'Connor, and Souter, Arizona's legislative decision to make mental disease or defect irrelevant to mens rea does not violate due process. Arizona has simply

"objectified" mens rea with regard to mental disease or defect. It has already done so regarding evidence of voluntary intoxication in Arizona Revised Statutes § 13-503, which does not violate due process under *Egelhoff*. Evidence of mental disease or defect is no different in this regard. Moreover, no one can disagree about what the state law is, as in *Egelhoff*, because the Arizona Supreme Court clearly held in *Mott* that evidence of mental disease or defect is *not* relevant to mens rea under Arizona law. 931 P.2d at 1050-51. Arizona's decision to make mental disease or defect irrelevant and nonexculpatory regarding mens rea is within its authority to define the elements of crimes and violates no fundamental principle of justice.

Clark contends that defining a mens rea so that evidence of mental disease or defect does not negate it violates due process because a person can be found guilty only if the State proves that he actually had the intent to commit the crime. (Petitioner's Opening Brief at 26-32.) Clark argues that the very circumstance that made him incapable of subjectively forming the requisite mens rea – his paranoid schizophrenia – is the very circumstance that Arizona has deemed irrelevant. But no principle of justice forbids States from defining mens rea in terms of objective facts and circumstances rather than subjective mental states. The States and the federal government often base criminal liability on whether a "reasonable person" would have known of a particular fact, circumstance, or consequence rather than on actual knowledge. *See United States v. Wurliger*, 981 F.2d 1497, 1504 (6th Cir. 1992) (collecting federal examples of criminal liability based on whether a defendant "had reason to know"); *State v. Lefevre*, 972 P.2d 1021, 1026 (Ariz. App. 1998) (collecting Arizona examples); *see also United States v. Galvan*, 407

F.3d 954, 957 (8th Cir. 2005) ("[W]e see no constitutional infirmity in the statute's visiting a criminal penalty on a person who had reasonable cause to believe" he had possessed methamphetamine.). In Clark's case, Arizona had to prove that Clark either (1) actually intended to kill Officer Moritz knowing that he was a police officer or (2) killed Officer Moritz under circumstances that would establish intent or knowledge but for his mental disease or defect. No fundamental principle of justice prevents Arizona from doing so.

Arizona has the authority to design its criminal justice system with a skeptical eye toward mental disease or defect evidence. This Court itself has repeatedly voiced its skepticism toward such evidence. *See Leland*, 342 U.S. at 801 ("The whole problem [of defining insanity] has evoked wide disagreement."); *id.* at 803 (Frankfurter, J., dissenting) ("Sanity and insanity are concepts of incertitude" "given varying and conflicting content at the same time and from time to time by specialists in the field."); *Greenwood*, 350 U.S. at 375 (The Court has repeatedly recognized the "uncertainty of diagnosis in this field and the tentativeness of professional judgment."); *Powell*, 392 U.S. at 536-37 (The Court should not establish a constitutional definition of insanity when the meaning of psychological terms, "let alone relevance, is not yet clear either to doctors or lawyers."). For this reason, this Court has given Congress wide discretion in matters psychological: "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Marshall v. United States*, 414 U.S. 417, 427 (1974). States and the District of Columbia share this Court's skepticism and have precluded mental disease

or defect evidence to negate mens rea. *See Bethea v. United States*, 365 A.2d 64, 89 (D.C. App. 1976) ("[T]he degree of sophistication of the psychiatric sciences and the validity and reliability of its evidentiary product are not without dispute."); *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985) (declining to permit psychological evidence to negate mens rea based in part on the "constant advance and change" in the knowledge of medicine and psychiatry); *Steele v. State*, 294 N.W.2d 2, 12 (Wis. 1980) ("[T]here is substantial doubt in respect to the trustworthiness and reliability of psychiatric testimony.").

States have many other reasons for excluding mental disease or defect evidence that does not rise to the level of insanity. Some States have decided that it is too difficult to ask jurors not only to determine whether a defendant is insane but also to determine, if the defendant is not insane, whether and to what degree his mental illness nevertheless affected his ability to form mens rea: "The problem is difficult enough when evaluating the gross standard of insanity in terms of criminal responsibility. It is intolerable when attempting to determine specific intent." *Steele*, 294 N.W.2d at 13; *accord State v. Provost*, 490 N.W.2d 93, 100 (Minn. 1992); *State v. Wilcox*, 436 N.E.2d 523, 529 (Ohio 1982); *Stamper*, 324 S.E.2d at 688; *see also Wahrlich v. Arizona*, 479 F.2d 1137, 1138 (9th Cir. 1973) ("[T]he state of the developing art of psychiatry is such that we are not convinced the psychiatric testimony directed to a retrospective analysis of the subtle gradations of specific intent has enough probative value to compel its admission."). Allowing psychological evidence to be admitted to negate mens rea also creates the risk that a defendant, instead of being found guilty except insane or not guilty by reason of insanity and committed for

treatment, will be acquitted and set free. *See Bethea*, 365 A.2d at 90-91; *Wilcox*, 436 N.E.2d at 527. Additionally, allowing such evidence to negate mens rea "opens the courtroom doors to virtually unlimited psychiatric testimony." *Provost*, 490 N.W.2d at 100 (internal quotation marks and citation omitted). Further, a State may simply wish to protect the integrity of its bifurcated trial procedure, in which guilt is tried before the issue of insanity. *See Steele*, 294 N.W.2d at 8-12. States thus have a multitude of valid policy reasons to limit the relevance of psychological evidence on the issue of mens rea.[5]

States may rationally conclude that defendants who have mental illnesses that fall short of insanity are no less culpable than those who have no mental illness: "So little self-control and rationality are necessary to obey the law, that when all the elements of a prima facie case are present, the person should be held fully legally culpable." Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 32 (1984). States may rationally decide that subtle distinctions among those who are mentally ill but not insane do not affect culpability:

> [T]he common law, many years ago, fixed a stable and constant standard of mental competence as the criterion for criminal responsibility. A person whose mental state falls outside the borderline drawn by the standard is deemed legally insane. All persons inside that borderline are presumed

---

[5] Some States, rather than prohibit the admission of mental disease or defect evidence altogether, limit its admission to crimes that have a "specific" – as opposed to a "general" – intent. *See Mill v. State*, 585 P.2d 546, 551 (Alaska 1979); *State v. Schouten*, 707 N.W.2d 820, 825 (S.D. 2005).

> sane and to possess a sufficient degree of reason to be responsible for [their] crimes.

Stamper, 324 S.E.2d at 688 (internal quotation marks and citation omitted). "Within the range of individuals who are not 'insane', the law does not recognize the readily demonstrable fact that as between individual criminal defendants the nature and development of their mental capabilities may vary greatly." *Bethea*, 365 A.2d at 87-88. Arizona has rationally concluded that defendants – like Clark – who do not have a mental disease or defect that makes them insane are criminally responsible for their crimes.

This does not mean, of course, that Arizona is indifferent to a defendant's mental disease or defect. Arizona provides for an insanity defense, and if a defendant is not insane but still possesses some mental disease or defect, Arizona mandates its consideration at sentencing as a mitigating circumstance. *See* Arizona Revised Statutes § 13-702(C)(2) (a trial court "shall consider" a defendant's mental disease or defect as a mitigating circumstance if "[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was significantly impaired."). The trial court found Clark's mental illness to be a mitigating circumstance. (R.T. 10/2/03, at 72.) This satisfies any due process right Clark may have to require a State to consider mental illness in its criminal justice system. *See Foucha*, 504 U.S. at 90 (O'Connor, J., concurring) ("If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of [*Foucha*] erects no bar to implementing that judgment.").

Arizona has legislatively designed a criminal justice system that considers a defendant's mental illness for two purposes: (1) if the defendant's mental illness is such that he is insane as defined under Arizona law, the defendant is deemed not criminally responsible for his actions and is committed to the Arizona State Hospital; (2) if the defendant's mental illness does not render him insane as defined under Arizona law, the trial court must consider it as a mitigating circumstance for sentencing purposes. No principle of justice the Due Process Clause recognizes requires Arizona to consider Clark's mental illness to negate mens rea. Arizona therefore tried and convicted Clark in accordance with due process.

CONCLUSION

For these reasons, Respondent requests that this Court affirm the judgment of the Arizona Court of Appeals.

Respectfully submitted,

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

RANDALL M. HOWE
Chief Counsel
Criminal Appeals Section
(Counsel of Record)

MICHAEL O'TOOLE
Assistant Attorney General

Attorneys for Respondent